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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 237

VICTOR RABINOWITZ, ET AL, PETITIONERS,

vs.

**ROBERT F. KENNEDY,
ATTORNEY GENERAL OF THE UNITED STATES.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**PETITION FOR CERTIORARI FILED JULY 30, 1963
CERTIORARI GRANTED OCTOBER 14, 1963**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 287

VICTOR RABINOWITZ, ET AL., PETITIONERS,

vs.

ROBERT F. KENNEDY,
ATTORNEY GENERAL OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. A] [File endorsement omitted]

[fol. 1]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 17,105

ROBERT F. KENNEDY, Attorney General of the United States,

Appellant

v.

VICTOR RABINOWITZ and LEONARD B. BOUDIN,

Appellees

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Joint Appendix—Filed November 17, 1962

[fol. 2] IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Number—3729-'61

PARTIES—VICTOR RABINOWITZ, LEONARD B. BOUDIN

v.

THE ATTORNEY GENERAL OF THE UNITED STATES,
Department of Justice

Attorneys—David Rein, Joseph Forer, 711 14th St.,
N.W.; David C. Acheson (U.S. Court House), George B.
Searls, Nathan L. Lenvin, Irene A. Bowman, Kathleen M.
Malone, Dept. of Justice

Action for—Declaratory Judgment

DOCKET ENTRIES

Date	Account
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1961

Nov. 15 Rein; Rec'd, 10 00

Nov. 15 U.S. Treas.—Disb'd 10 00

Date	Proceedings
------	-------------

1961 Deposit for cost by

Nov. 15 Complaint, appearance, Exhibits A & B. filed

Nov. 15 Summons, copies (2) and copies (2) of Complaint issued U.S. Atty ser. 11-15-61. Atty Gen. ser. 11-17-61.

[fol. 3]

1962

Jan. 11 Answer of deft to complaint; c/m 1-11-62; Appearance of David C. Acheson; Nathan B. Levin, Irene A. Bowman, and Kathleen M. Malone. filed

Jan. 11 Calendared (N)

Jan. 17 Motion of deft for judgment on the pleadings; c/m 1-17-62; P & A; M.C. 1-17-62. filed

Jan. 24 Stipulation of counsel for pltf and deft extending time for pltfs to file opposition to defts motion for judgment on pleadings to and including 2-16-62. filed

Feb. 16 Opposition of pltf to deft's motion for judgment on pleadings; c/m 2-16-62. filed

Mar. 20 Motion of deft for Judgment on the Pleadings argued & submitted. Curran, J.

Apr. 4 Order denying motion of deft for judgment on the pleadings. (N) Curran, J.

Apr. 13 Motion of defendant to amend order; consent filed

1962

- Apr. 13. Order denying motion for judgment on the pleadings; immediately appeal from this order may materially advance the ultimate termination of the litigation. (N) Curran, J.
- May 15 Appearance of George B. Searls as atty for deft. (AC/N) filed.
- May 15 Notice of appeal by deft; copy mailed to David Rein. filed
- May 16 Certified copy of order of USCA granting permission to appeal from USDC order of 4/13/62. filed.

[fol. 4] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 3729-61

[Title omitted]

COMPLAINT FOR DECLARATORY JUDGMENT
Filed November 15, 1961

The plaintiffs, Victor Rabinowitz and Leonard B. Boudin, complaining of the defendant, the Attorney General of the United States, allege:

1. The Court has jurisdiction of this action under D.C. Code, sections 11-305 and 11-306, and 28 U.S. Code, section 2201.

2. The plaintiffs are members of the bar of the State of New York and of various federal courts, including the Supreme Court of the United States. They are engaged in the general practice of law under the firm name of Rabinowitz and Boudin, with their principal office in New York City.

3. The defendant is by law charged with the administration of the Foreign Agents Registration Act of 1938, as amended, 22 U.S. Code, sections 611 ff.

4. On or about September 10, 1960, the law firm of Rabinowitz and Boudin was retained by the Government of the Republic of Cuba to represent in the United States the

4

Republic of Cuba and its governmental agencies in legal [fol. 5] matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba. The retainer includes the authority to retain counsel in States where the firm is not licensed to practice. The retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, nor have the plaintiffs advised, represented, or acted on behalf of the Republic of Cuba in any such matters.

5. On or about August 31, 1961, the defendant, acting through his subordinates, demanded that the plaintiffs, individually and as a law firm, register with the Attorney General under the provisions of the Foreign Agents Registration Act of 1938, as amended.

6. Thereafter the plaintiffs discussed the demand for their registration with the subordinates of the defendant, maintaining that their representation of the Republic of Cuba does not fall within the purview of the Act. The defendant nevertheless continues to insist on his registration demand. Therefore, unless plaintiffs register in accordance with the provisions of the Act and the rules and regulations thereunder, they face indictment and prosecution for violation of the Act.

7. In accordance with the authority conferred upon the defendant by the Act, the defendant has published and prescribed Forms FA-2 and FA-4 as the registration forms required to be filed under that Act. If the plaintiffs should execute these forms they would thereby make public disclosure not only of their relation with their foreign principal, but of numerous private, personal and business affairs unconnected with their representation of the Republic of Cuba. In addition, similar public disclosures of private, personal and business affairs having no connection with their representation of the Republic of Cuba would be required from employees of the plaintiffs and counsel who may be retained by plaintiffs in connection [fol. 6] with litigation in the courts throughout the country. Forms FA-2 and FA-4 are attached hereto and made part hereof as Exhibits A and B respectively.

8. The plaintiffs have freely furnished to all government authorities authorized to request such information the particular details concerning their representation of the Republic of Cuba.

9. The activities of the plaintiffs as legal representatives of the Republic of Cuba do not fall within the purview of the Foreign Agents Registration Act of 1938, as amended, and also are specifically exempted from the requirements of registration under the Act by section 3(d) of the Act.

10. Registration under the Act will result in a serious invasion of the privacy of the plaintiffs. Moreover, this invasion of privacy will seriously interfere with the practice of law by the plaintiffs, since other lawyers whom they will wish to employ or retain may refuse to accept such employment or retainers at the price of incurring a similar invasion of their privacy.

11. Plaintiffs in good faith believe that their activities do not come within the scope of the Act and that they are not required to register under the Act. Accordingly, they are faced with the dilemma of either registering, although not legally required to do so, or incurring indictment, prosecution and possibly even conviction, for refusing to register. Indictment and prosecution, even without more, will seriously damage plaintiffs' reputation and interfere with their practice of law and their ability to employ and retain associate counsel.


12. Plaintiffs have no administrative remedy and no adequate remedy at law.

{fol. 7] Wherefore, plaintiffs demand judgment declaring that their activities as legal representatives for the Republic of Cuba do not subject them to the requirements of registration under the Foreign Agents Registration Act of 1938, as amended, and granting such other and further relief as may be appropriate.

David Rein, Joseph Forer, Forer & Rein, 711 14th St., N.W., Washington, D. C., Attorneys for Plaintiffs.

[fol. 8]

EXHIBIT, A TO COMPLAINT

(See opposite) 

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

Form FA-1

FOR REGISTRATION STATEMENTS OF PARTNERSHIPS,
CORPORATIONS, ASSOCIATIONS, AND ALL OTHER
ORGANIZATIONS AND GROUPS*Pursuant to Section 2 of the Foreign Agents
Registration Act of 1938, as Amended*

INSTRUCTION SHEET—READ CAREFULLY

1. *Form for Registration of Organizations.*—All partnerships, corporations, associations, and other organizations and groups required to register under Section 2 of the Act shall use this form for their registration statements.

2. *Read Act and Rules.*—The Act and the Rules thereunder should be carefully read before filling in this form. Copies of the Act and Rules may be obtained from the Department of Justice without charge.

3. *File Two Copies of Statements.*—Two copies of the statement, including exhibits, are to be filed. An additional copy of the statement and exhibits should be prepared and retained by Registrant for future reference.

4. *File Statements With Department of Justice.*—The statement is to be filed with the Department of Justice, Washington, D. C.

5. *Answer All Items.*—All items of the form are to be answered. Where the answer to an item is "none" or "inapplicable," so state.

6. *Inappropriate or Burdensome Requirements.*—If compliance with any requirement of the form appears in any particular case to be inappropriate or unduly burdensome, the Registrant may apply for a complete or partial waiver of the requirement. Applications for such waivers should state fully the reasons why the waiver is desired.

7. *Information Not Obtainable.*—If any of the information called for by any item of this form is not known and cannot readily be ascertained, so indicate and state briefly the reasons why the information cannot be obtained.

THIS STATEMENT WILL NOT BE ACCEPTED FOR FILING UNLESS IT IS REASONABLY COMPLETE AND
ACCURATE AND IS SIGNED AND SWORN TO IN ACCORDANCE WITH THE REQUIREMENTS OF THE FORM.

NOTE.—Omit this instruction sheet when filing statements.

[fol. 9]

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

REGISTRATION STATEMENT

Pursuant to Section 2 of the Foreign Agents
Registration Act of 1938, as Amended

- (a) Name of Registrant.
- (b) All other names used by Registrant during the past 10 years and when used.
- (c) Address of principal office.
- (d) Name of person or persons in charge of principal office.
- (e) Date when Registrant was organized or created.
- (f) State or other jurisdiction in which organized or created.
- (g) Type of Registrant's organization.
- Committee Voluntary group Association Partnership
- Corporation Other type (specify)
- If Registrant is a nonbusiness membership organization, state:
- (a) Approximate number of members in the United States.
- (b) Approximate number of members outside the United States.
- (c) If more than one class of members, specify classes and approximate number of members in each.
- (d) Who may be members and on what terms and conditions.

All partners, officers, directors, and similar officials of Registrant.

Name and address of official

Position, office, or nature of duties

All branches and local units of Registrant and all other component or affiliated groups or organizations.

Name and address of branch, unit, group, or organization

Nature of connection with Registrant

Name and address of person in charge

Name and principal address of each foreign principal of Registrant.

Name of foreign principal

Principal address

State the nature and purpose of Registrant's representation of each foreign principal named under item 6 and describe fully all activities of Registrant for or in the interests of each such foreign principal.

[fol. 11]

FORM PA-2

8. Describe briefly all other businesses, occupations, and public activities in which Registrant is presently engaged.

9. All employees and other individuals, except those named under item 4, who render any services or assistance to Registrant, with or without compensation, for or in the interests of each foreign principal named under item 6.

Name and address of employee or other individual

Nature of services or assistance rendered

10. Furnish the following information as to Registrant's receipts and expenditures during the 3 months preceding the filing of this statement. The information may, if Registrant desires, be furnished for Registrant's latest fiscal quarter or other latest fiscal period of not less than 3 months.

(a) All amounts received during the period directly or indirectly from each foreign principal named under item 6, itemized as follows: *

Date funds
received

Name of foreign principal
from whom funds received *

Purpose for which
received *

Amount received *

* Include all amounts so received, whether received as compensation, loans, contributions, subscriptions, fees, dues, rebates, or otherwise.

* Receipts from a person amounting to less than \$100 for the period may be combined with other like amounts, provided the source of the funds is clearly indicated.

* Where funds were received for various purposes, each purpose shall be listed in reasonable detail.

* Show separately the amount received for each purpose listed under the preceding column.

(b) All amounts received during the period from other sources to be used directly or indirectly for or in the interests of any foreign principal named under item 6, itemized as follows:¹

Date funds received	Name of person from whom received	Purpose for which received	Amount received
---------------------	-----------------------------------	----------------------------	-----------------

(c) All expenditures made during the period directly or indirectly for or in the interest of each foreign principal named under item 6, itemized as follows:²

Date payment was made	Name of person to whom payment was made	Purpose for which payment was made	Amount of payment
-----------------------	-----------------------------------------	------------------------------------	-------------------

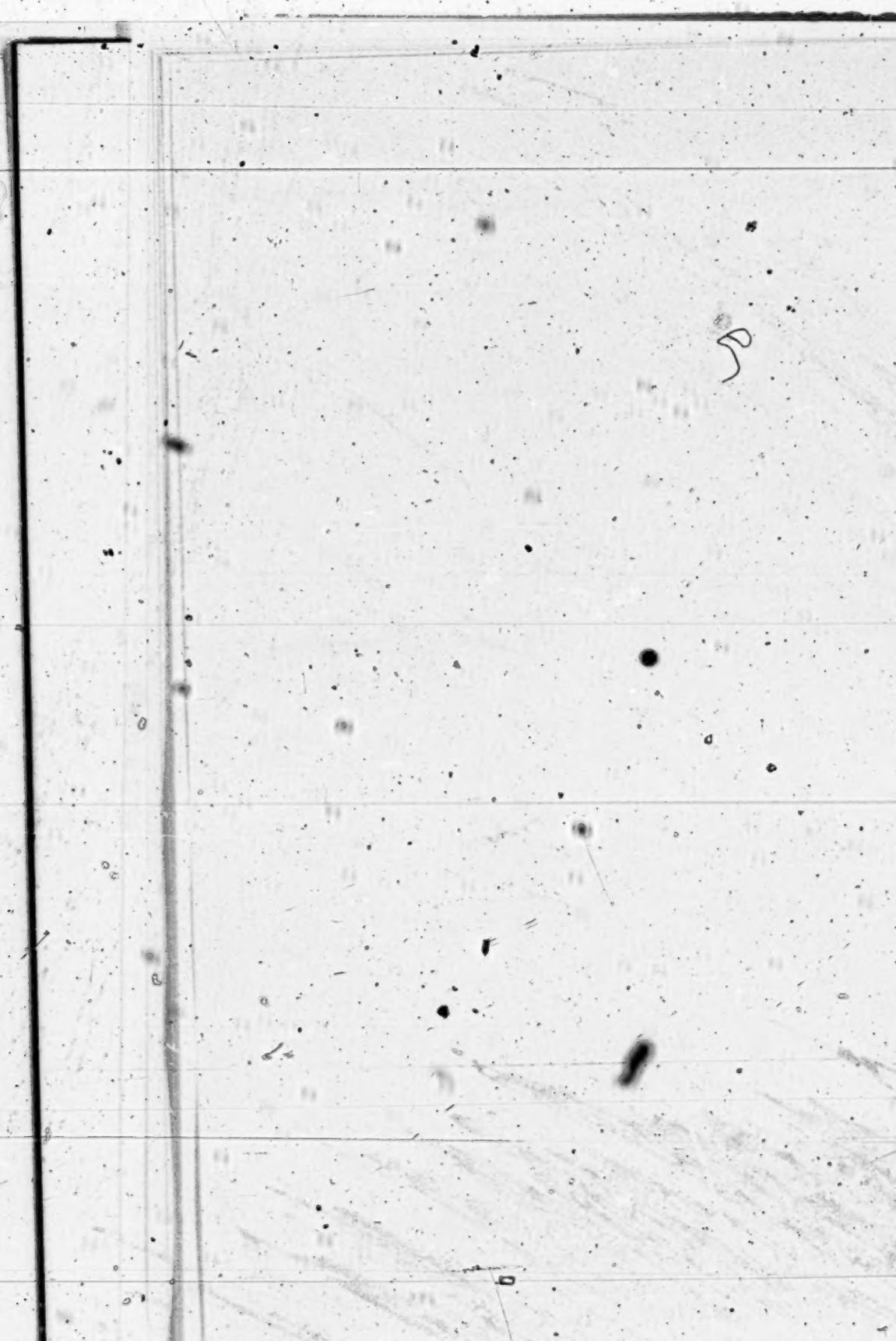
¹ Include all amounts so received, whether received as compensation, loans, contributions, subscriptions, fees, dues, rebates, or otherwise.

² Receipts from or payments to a person amounting to less than \$100 for the period may be combined with other like amounts, provided the source or disposition of the funds, as the case may be, is clearly indicated.

³ Where funds were received or paid, as the case may be, for various purposes, each purpose shall be listed in separate detail.

⁴ Show separately the amount received or paid, as the case may be, for each purpose listed under the preceding column.

⁵ Include all transfers of funds to any foreign principal.



[fol. 13]

11. (a) Speeches, lectures, talks, and radio broadcasts arranged or sponsored by Registrant or delivered by officials or employees of Registrant, during the past 3 months.

Date delivered	By whom delivered	Where delivered	Kind of audience	Subject matter discussed
----------------	-------------------	-----------------	------------------	--------------------------

- (b) Publications prepared or distributed by Registrant, or by others for Registrant, or in the preparation or distribution of which Registrant rendered any services or assistance, during the past 6 months. (Indicate each type of publication by an "X".)

(1) Press releases	(8) Circulars	(15) Lantern slides
(2) News bulletins	(9) Form letters	(16) Still pictures
(3) Newspapers	(10) Reports	(17) Posters
(4) Articles	(11) Copies of speeches, lectures, talks, or radio broadcasts	(18) Photographs
(5) Books	(12) Radio programs	(19) Charts
(6) Magazines	(13) Radio scripts	(20) Maps
(7) Pamphlets	(14) Moving pictures	(21) Other publications

- (c) Preparation of publications referred to in answer to (b) above.

Number checked under (b)	Description of publication	By whom written, edited, or prepared	By whom printed, produced, or published
--------------------------	----------------------------	--------------------------------------	-----------------------------------------

- (d) Distribution of publications referred to in answer to (b) above.

Number checked under (b)	Name of distributor	Methods and channels of distribution	Class or group of persons to which distributed
--------------------------	---------------------	--------------------------------------	------------------------------------------------

FORM FA-3

12. (a) Registrant's affiliations, associations, or other connections, not fully described above, with foreign governments, foreign political parties, or officials or agencies thereof.

Name of government, party, or official
or agency thereof

Nature of Registrant's connection therewith

- (b) Registrant's pecuniary interest in or control over partnerships, corporations, associations, or other organizations or combinations of individuals, not fully described above.

Name of organization
or combination

Nature of Registrant's ownership
or other pecuniary interest

Nature of any direction or control
exercised by Registrant

13. (a) Ownership of, or supervision, direction, or control over, Registrant by all organizations, groups, or individuals.

Name of organization, group, or individual

Nature of ownership, supervision,
direction, or control

(b) Any subsidy or other financial assistance received by Registrant directly or indirectly from—

Any individual who is a citizen of, or resides in, a foreign country.

Any organization created in, or under the laws of, any foreign country or having its principal place of business in a foreign country.

Any foreign government or foreign political party, or any official or agency thereof.

Name of person from whom subsidy or
financial assistance received

Nature and amount of subsidy

14. File the following exhibits with this statement:

Short Form Registration Statement—File a Short Form Registration Statement, on the printed form provided therefor, for each person named under items 4 and 9.

Exhibit B.—File, a copy of the agreement, arrangement, or authorization (or if not in writing a written description thereof) pursuant to which Registrant is acting for, or receiving funds from, each foreign principal named under item 6.

Exhibit C.—File an Exhibit C, on the printed form provided therefor, for each foreign principal named under item 6.

Exhibit D.—If Registrant is a nonbusiness organization, file a copy of its charter, constitution, bylaws, or other instruments of organization.

Exhibit E.—File copies of all printed matter referred to under item 11 (b), except photographs and moving pictures.

Exhibit F.—File a copy of the agreement or arrangement (or if not in writing, a written description thereof) between the Registrant and each business firm or other organization named under item 11 (c) or (d).

The undersigned swear(s) or affirm(s) that he has (they have) read the information set forth in this registration statement and the attached exhibits and that he is (they are) familiar with the contents thereof and that such contents are in their entirety true and accurate to the best of his (their) knowledge and belief, except that he undersigned make (s) no representation as to the truth or accuracy of the information contained in attached Short Form Registration Statements, insofar as such information is not within his (their) personal knowledge.

(Type or print name under each signature)

(Signature)

(Signature)

(Signature)

(Signature)

(Both copies of this statement shall be signed and sworn to before a notary public or other person authorized to administer oaths. The statement shall be signed by the Agent or, if the Agent is an organization, by a majority of those partners, officers, directors, or persons performing similar functions who are in the United States. If no such person is in the United States, the statement shall be signed and sworn to by the duly authorized representative of the Registrant.)

Subscribed and sworn to before me at

this _____ day of _____, 19____

(Signature of notary or other officer)

My commission expires _____, 19____



EXHIBIT B TO COMPLAINT

Form No. 7A-4
(24, 12-27-55)Budget Bureau No. 43-8215.6
Approved expires 1-31-63UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

SHORT-FORM REGISTRATION STATEMENT

Under the Foreign Agents Registration Act of 1938, as Amended

This statement is required to be filed by all officers, directors, partners, or associates in conjunction with a registration statement filed in the name of a corporation, partnership, association or other combination of individuals, as the case may be, and by all persons who render services or assistance to the registrant in other than a clerical or secretarial capacity, with or without compensation, for or in the interest of any foreign principal of the registrant.

THIS STATEMENT WILL NOT BE ACCEPTED FOR FILING UNLESS IT IS COMPLETE AND ACCURATE.

1. Name and address of registrant.

2. (a) Your full name.

(b) All other names ever used and when each was used.

(c) All present business addresses.

(d) All present residence addresses.

3. (a) Date and place of birth.

(b) Citizenship or nationality.

(c) If present citizenship not acquired by birth, indicate when, where, and how acquired.

4. All visits to or residence in foreign countries during the past 5 years.

Name of foreign country

Purpose of visit or stay
in foreign countryDate and port of each departure from
and entry into United States

All clubs, societies, committees, and other associations organizations in the United States or elsewhere, including any active or reserve military or naval forces, of which you have been a member, director, officer, or employee during the past 2 years.

Name and address of
organization

Nature of connection with
organization

Duration of connection

(a) A full description of all activities of any kind in which you are now or expect to be engaged for or in the interests of the Registrant or any foreign principal of yourself or of the Registrant.

(b) A brief description of all other businesses, occupations, and public activities in which you are now engaged.

(c) Describe in detail the financial arrangement pursuant to which you are rendering services or assistance to the registrant for or in the interests of any foreign principal of the registrant.

(d) Furnish the following information as to all amounts or thing of value received by you, as compensation or otherwise, during the 3 months preceding the filing of this statement, directly or indirectly from the registrant or from any foreign principal of yourself or of the registrant.

Date funds
received

Name of person from whom
received

Purpose for which
received

Amount or thing of value
received

[fol. 19]

8. (a) Speeches, lectures, talks, and radio and television broadcasts delivered by you during the past 3 months.

Date delivered	Where delivered	Kind of audience	Subject matter discussed
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(b) All newspapers, magazines, articles, books, pamphlets, press releases, moving pictures, radio and television programs and scripts, and other publications, prepared or distributed by you or by others for you, or in the preparation or distribution of which you rendered any services or assistance, during the past 6 months.

Description of publication	By whom written, edited, or prepared	By whom printed, produced, or published	By whom distributed
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9. List all of your connections, not fully described above, with all foreign governments, foreign political parties or officials or agencies thereof.

Name of government, party or official or agency thereof	Nature of your office, employment, or other connection	Nature of any subsidy or other financial arrangement
---------------------------------------------------------	--------------------------------------------------------	------------------------------------------------------

I certify that I have read the information set forth in this statement and am familiar with the contents thereof and that the information herein contained is true to the best of my knowledge and belief.

(Signature)

(Date of signature)

(Type or print name)

(Two copies of this statement shall be filed. Both copies shall be signed by the person for whom the information contained herein is given. A third copy should be prepared and retained for future reference.)

[fol. 21]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 3729-61

ANSWER—Filed January 11, 1962

Comes now the defendant by the undersigned attorneys and fully answering the complaint avers as follows:

First Defense

The Court is without jurisdiction over the subject matter.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

The nature of the relief sought by the complaint is an advisory opinion which this Court lacks jurisdiction to render.

Fourth Defense

The injury to plaintiffs alleged by the complaint is too remote to give standing to sue.

Fifth Defense

The complaint fails to show a justiciable case or controversy.

Sixth Defense

Answering specifically the numbered paragraphs of the complaint, the defendant further avers:

1. The allegations of Paragraph 1 are denied.

2. The allegations of Paragraph 2 are admitted.

[fol. 22] 3. The allegations of Paragraph 3 are admitted.

4. Answering the allegations of Paragraph 4, the defendant admits the allegations contained in the first sentence but as to the second and third sentences the defendant has neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained therein.

5. The allegations of Paragraph 5 are admitted.

6. Answering the allegations of Paragraph 6, the defendant admits the allegations contained in the first and second sentences. Further answering, with respect to the third sentence, under the provisions of the Act any person who wilfully fails to file a registration statement as required by the statute is subject, upon conviction thereof, to criminal penalties as provided therein.

7. Answering the allegations of Paragraph 7, the defendant admits the allegations contained in the first and fourth sentences. With respect to the second sentence the defendant admits that the registration forms provided for under the terms of the Act require the plaintiffs to make public disclosure of their relations with their foreign principal, but the defendant denies that the registration forms require public disclosure of numerous private, personal and business affairs unconnected with the plaintiff's representation of the Republic of Cuba. Further answering, no reply is required of the defendant to the allegations contained in the third sentence since they are conclusions of law, but to the extent an answer may be required, the defendant denies the allegations therein.

8. The defendant is not required to answer the allegations of Paragraph 8 since they are immaterial, but to the extent that an answer be required, with respect to the Department of Justice the defendant avers that plaintiffs have failed to furnish the Department with a properly executed registration statement as requested.

9. The allegations of Paragraph 9 are denied.

[fol. 23] 10. With respect to Paragraph 10, the defendant is not required to answer the allegations contained therein in that they are conclusions of law and immaterial, but to the extent an answer may be required, the defen-

dant has neither knowledge nor information sufficient to form a belief as to the truth of the allegations contained in this paragraph.

11. The defendant is not required to answer the allegations of Paragraph 11 as they contain conclusions of law and are immaterial, but to the extent that answer be required, the defendant has neither knowledge nor information sufficient to form a belief as to the truth of what the plaintiffs believe in good faith. Further answering, the defendant avers that the plaintiffs refuse and have refused to register under the requirements of the Act as requested by the defendant.

12. The allegations of Paragraph 12 are denied except that the defendant admits that the Act does not provide an administrative remedy. The defendant avers, however, that Congress has provided an adequate remedy at law.

David C. Acheson, United States Attorney, Nathan B. Lenvin, Attorney, Department of Justice, Irene A. Bowman, Attorney, Department of Justice, Kathleen M. Malone, Attorney, Department of Justice.

[fol. 24]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 3729-61

DEFENDANT'S MOTION FOR JUDGMENT ON THE
PLEADINGS—Filed January 17, 1962

Comes now the defendant by the undersigned attorneys and moves for judgment on the pleadings for the reason that on the pleadings defendant is entitled to judgment as a matter of law.

David C. Acheson, United States Attorney, Nathan B. Lenvin, Attorney, Department of Justice, Irene A. Bowman, Attorney, Department of Justice, Kathleen M. Malone, Attorney, Department of Justice.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 3729-61

ORDER—Filed April 4, 1962

This cause came before the Court on defendant's motion for judgment on the pleadings. The Court, having heard counsel for the parties in open court, and having considered the pleadings and the memoranda filed by the parties, it is by the Court this 4th day of April, 1962,

Ordered that defendant's motion for judgment on the pleadings be and the same is hereby denied.

Edward M. Curran, United States District Judge.

Copy mailed this 4th day of April, 1962 to Nathan B. Lenvin, Department of Justice, Washington, D. C., Attorney for Defendant.

[fol. 26]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 3729-61

MOTION TO AMEND ORDER—Filed April 13, 1962

Comes now the defendant by the undersigned attorneys and moves the Court to amend its order denying the defendant's motion for judgment on the pleadings in the above entitled action so as to certify, pursuant to the provisions of 28 U.S.C. 1292(b), that the Court is of the opinion that the Order denying defendant's motion for judgment on the pleadings involves a controlling question of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit, and that there is substantial ground for difference of opinion thereon, and that immediate

appeal from the said Order may materially advance the ultimate termination of the litigation.

A proposed form of order is submitted herewith for consideration of the Court.

Respectfully submitted,

David C. Acheson, United States Attorney; Nathan B. Lenvin, Attorney, Department of Justice; Kathleen M. Malone, Attorney, Department of Justice.

Consented to: David Rein, Attorney for Plaintiffs.

[fol. 27]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

ORDER—Filed April 13, 1962

This cause came before the Court on defendant's motion for judgment on the pleadings. The Court, having heard counsel for the parties in open court, and having considered the pleadings and the memoranda filed by the parties, it is hereby

Ordered, adjudged, and decreed that said motion for judgment on the pleadings be and hereby is denied.

And the Court is of the opinion that this Order involves a controlling question of law, as to whether individuals requested to register under the Foreign Agents Registration Act of 1938, as amended, may have their rights adjudicated by a declaratory judgment suit, and that there is substantial ground for difference of opinion thereon, and that immediate appeal from this Order may materially advance the ultimate termination of the litigation.

Edward M. Curran, U.S.D.J.

April 13, 1962.

[fol. 28]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,989—September Term, 1961

District Court Civil Action 3729-61

ROBERT F. KENNEDY, Attorney General of the
United States, Applicant,

v.

VICTOR RABINOWITZ and
LEONARD B. BOUDIN, Respondents.

Before: Wilbur K. Miller, Chief Judge, and Fahy and
Bastian, Circuit Judges, in Chambers.

ORDER—Filed May 11, 1962

Upon consideration of the application for permission to
appeal from an interlocutory order of the District Court
and of respondents' answer, it is

Ordered by the court that, pursuant to Section 1292(b)
of Title 28 U.S.C., permission to appeal from the order
of the District Court dated April 13, 1962 denying appli-
cant's motion for judgment on the pleadings, be, and it is
hereby, granted.

Per Curiam.

Dated: May 11, 1962

Circuit Judge Bastian dissents.

[fol. 29]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3729-61

VICTOR RABINOWITZ and
LEONARD B. BOUDIN, Plaintiffs,

THE ATTORNEY GENERAL OF THE UNITED STATES, Defendant.

NOTICE OF APPEAL—Filed May 15, 1962

The United States Court of Appeals for the District of Columbia Circuit having granted on May 11, 1962, defendant's petition for leave to appeal in accordance with Section 1292(b) of Title 28 United States Code and Rule 91½ thereunder, the said defendant, Robert F. Kennedy, Attorney General of the United States, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this Court entered on April 13, 1962 in favor of the plaintiffs against the defendant, denying the defendant's motion for judgment on the pleadings.

Dated: May 15, 1962.

J. Walter Yeagley, Assistant Attorney General;
Nathan B. Lenvin, George B. Searls, Attorneys,
Department of Justice, Attorneys for Defendant.

To: David Rein, 711 14th Street, N.W., Washington, D. C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 17,105

ROBERT F. KENNEDY, Attorney General of the
United States, Appellant;

v.

VICTOR RABINOWITZ and
LEONARD B. BOUDIN, Appellees.

Appeal from the United States District Court
for the District of Columbia

OPINION—Decided April 4, 1963

Mr. George B. Searls, Attorney, Department of Justice,
for appellant.

Mr. David Rein for appellees.

Before WILBUR K. MILLER, FAHY and WRIGHT, Circuit
Judges.

WRIGHT, Circuit Judge: The Foreign Agents Registration Act¹ provides criminal penalties² against anyone who represents a foreign government in this country and fails to register with the Attorney General. Certain exceptions [fol. 31] are provided.³ Appellees are attorneys at law representing the Republic of Cuba who have been requested by the Attorney General to register pursuant to the Act. Instead of registering, appellees filed this declaratory judg-

¹ 52 Stat. 631, as amended, 22 U.S.C. §§ 611 *et seq.* 0

² 52 Stat. 633, as amended, 56 Stat. 257, 22 U.S.C. § 618.

³ 52 Stat. 632, as amended, 56 Stat. 254, 22 U.S.C. § 613.

ment action, alleging that since their representation of Cuba is limited to "legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba," they are exempt from registering under Section 3(d)⁴ of the Act. They pray for a judgment so declaring. In effect, therefore, this proceeding is an effort to restrain the Attorney General from prosecuting appellees under the Act. The District Court denied appellant's motion for judgment on the pleadings and certified this action for appeal.⁵

The threshold question is presented by the venerable, but creaking, doctrine of sovereign immunity. There is no suggestion that the United States has consented to this suit or that the Attorney General is being sued as an individual. Indeed, the named defendant is "The Attorney General of the United States," the name of the current office holder not being included.⁶ Consequently, the action, if maintainable at all, must fit the fiction created by *Ex parte Young*, 209 U.S. 123 (1908). There it was held that where an officer acts unconstitutionally, "he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. Since in such circumstances the officer is theoretically being sued as an individual, the doctrine of sovereign immunity provides no bar. Thus a fiction is indulged to circumvent sovereign immunity.

[fol. 32] *Ex parte Young*, *supra*, has spawned a welter of cases, all seeking to get under its umbrella.⁷ The confusion which ensued has been to some extent relieved by the holding in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 (1949), reiterated in *Malone v. Bowdoin*, 369 U.S. 643 (1962), that an officer of the United States may indeed be sued in his individual capacity where the officer's action is "not within the officer's statutory powers or, if within those

⁴ 52 Stat. 632, as amended, 56 Stat. 254, 22 U.S.C. § 613(d).

⁵ 28 U.S.C. § 1292(b).

⁶ The Attorney General's name first appeared on the appeal papers in this court.

⁷ See 3 Davis, Administrative Law, ch. 27 (1958).

powers, only if the powers, or their exercise in the particular case, are constitutionally void." 337 U.S. at 702 and 369 U.S. at 647.

It is not alleged in the complaint that prosecution of the appellees under the Act would be unconstitutional^a or outside the Attorney General's statutory powers.^a Appellees' [fol. 33] primary argument on the unconsented suit point seems to be that "the doctrine that a suit against a government officer in his official capacity may be a suit against the United States applies only in the situation where the suit is either for government funds or for specific property in the possession of the government." We are not aware

^a In arguing that this is an appropriate case for declaratory judgment, appellees assert that the penalties are so severe that they dare not await prosecution. Therefore, they assert, a civil forum must be available or the Act can never be tested. A civil forum may be available under these circumstances, for this argument may raise a constitutional question. *Yakus v. United States*, 321 U.S. 414, 438 (1944); *Ex parte Young, supra*, 209 U.S. at 145-148. Appellees, aided by competent counsel, for reasons best known to themselves, have decided not to raise the constitutional issue. Under the circumstances, and for the purposes of this motion, we accept appellees' pleadings as presented.

^a Appellees do argue in their brief that their activities "are expressly exempted from the Act by the terms of the Act itself" and that to this extent appellant's demand that they register is "in excess of his statutory authority." The Attorney General, however, is charged with enforcement of all the criminal laws of the United States, 28 U.S.C. § 507. Such duty obviously carries with it the authority to construe the individual statutes and apply them to the facts before him. At most, appellees' claim is that appellant has erred, or will err, in construing the law. But the relief for which appellees here pray "can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Larson v. Domestic & Foreign Corp., supra*, 337 U.S. at 690. See also *United States v. Thompson*, 251 U.S. 407, 413 (1920); *Goldberg v. Hoffman*, 7 Cir., 225 F.2d 463 (1955); *Fay v. Miller*, 87 U.S.App.D.C. 168, 171, 183 F.2d 986, 989 (1950); *United States v. One 1940 Oldsmobile Sedan Automobile*, 7 Cir., 167 F.2d 404 (1948); *District of Columbia v. Buckley*, 75 U.S.App.D.C. 301, 304, 128 F.2d 17, 20 (1942), cert. denied, 317 U.S. 658 (1942); *United States v. Segelman*, W.D. Pa., 86 F.Supp. 114 (1949); *United States v. Brokaw*, S.D. Ill., 60 F.Supp. 100 (1945).

that the doctrine of sovereign immunity is so circumscribed. If "the 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would . . . interfere with the public administration," the suit is one against the sovereign. *Land v. Dollar*, 330 U.S. 731, 738 (1947), citing *Ex Parte State of New York, No. 1*, 256 U.S. 490, 500, 502 (1921).¹⁰ Obviously, restraining the Attorney General from enforcing the criminal laws of the United States would "interfere with the public administration."

Appellees rely heavily on Professor Borchard in arguing that civil procedure should be substituted for criminal procedure in the area not involving moral turpitude, particularly "where there is grave uncertainty as to what practices the general terms of a law prohibit." Borchard, *Declaratory Judgments* (2d Ed. 1941), p. 1021. They also assert with Professor Borchard "that one of the main and [fol. 34] most beneficial functions of declaratory judgment procedure is as a substitute for criminal prosecutions in the area of regulation of business practices." Philosophically, we may agree. But the Congress has decreed otherwise, at least so far as agents representing foreign governments are concerned. Consequently, since appellees have failed to challenge the constitutionality of the Act, on its face or as applied, or the authority of the Attorney General to enforce it, this case should be dismissed on the pleadings as an unconsented suit against the United States.

So ordered.

FAHY, Circuit Judge, dissenting: The suit does not seem to me to be one to enjoin a criminal prosecution, which equity ordinarily will not entertain. The Foreign Agents Registration Act is not such a criminal statute as is involved in cases which illustrate the equitable doctrine. It is primarily a regulatory statute, with a penalty of not more than \$10,000 fine, or imprisonment for not more than five years, or both, for willful violation of any of its pro-

¹⁰ See also *Larson v. Domestic & Foreign Corp.*, *supra*, Note 9, at 688; *Stanley v. Schwalby*, 147 U.S. 508 (1893); *Reisman v. Caplin*, — U.S.App.D.C. —, — F.2d — (No. 16,690, decided 2/7/63), p. 4, slip opinion.

visions. Section 618(a). It is not a crime to be a foreign agent, but to act as one unless a specified registration statement is filed, or unless one "is exempt from registration under the provisions of this subchapter." Section 612(a). Appellees allege that they are within the statutory exemption of "any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of such foreign principal. . . ." Section 613(d). They allege that they are lawyers and that their representation of Cuba is limited to "legal matters, including litigation, involving the mercantile and financial interests of the Republic of Cuba," that their retainer does not cover advice or representation involving public relations, propaganda, lobbying, or political or other non-legal matters, and that they have not advised, represented, or acted on behalf of Cuba in any such matters. The answer of appellant alleges that he does not have sufficient information to form a belief as to the truth of these allegations respecting matters other than legal. Appellant denies, however, that appellees come within the exemption and has insisted that they file the registration statement. In this situation the District Court, I think properly, denied appellant's motion for judgment on the pleadings.

Since the Attorney General is responsible for administering and enforcing the statute, appellees were under the necessity either of filing the detailed information required by a registration statement and acquiescing in the status attributed to them by appellant, or of being criminally prosecuted and risking the statutory penalties, unless they could secure a declaratory judgment as to their status. There is more in this situation than the impact upon appellees of the mere existence of the statute, and more too than a mere difference of opinion. There is a demand and insistence by appellant that they file the registration statement. A case or controversy—a justiciable issue—thus arose. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

The suit is not accurately described as one to enjoin a criminal prosecution. It is to determine the existence of an obligation on appellees' part affirmatively to register in

circumstances which create a justiciable issue in that regard. No administrative remedy is provided and there is no remedy at law comparable in adequacy to that available through the Declaratory Judgment Act. See *Greene v. McElroy*, 360 U.S. 474 (1959). The Act combines with equity to afford a remedy, for equity is served by not forcing registration in the face of well-founded doubt of the need to do so, until that doubt is resolved—a doubt which [fol.36] we must assume in the present posture of the case is held in good faith. See *Terrace v. Thompson*, 263 U.S. 197 (1923). The thrust of the suit is presently too far removed from an effort to enjoin a criminal prosecution to come within the principle adverted to under which equity sometimes denies itself jurisdiction. This principle long antedated the Declaratory Judgment Act and when now invoked should be considered in conjunction with that Act.¹

Nor, as it seems to me, is the suit one against the United States within the sovereign immunity doctrine which protects the Government, without its consent, from judicial interference in the disposition of its property or in its appropriate functioning. *Reisman v. Caplin*, — U.S. App. D.C. —, — F.2d — (1963). The American approach to this doctrine has not precluded suits against officials acting in excess of constitutional or statutory authority. See, e.g., *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). Appellees do not claim, however, that the statute is unconstitutional, so the question narrows to whether the effort of the appellant to require appellees to register is within his statutory authority as that concept has been used in defining the sovereign's

¹ Appellant cites *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), and *Watson v. Buck*, 313 U.S. 387 (1941), both of which, however, involved efforts to have a federal court enjoin state action, which turn upon different considerations. Nor are *Eccles v. Peoples Bank*, 333 U.S. 426 (1948); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), and *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945), also cited, controlling, because no real controversies were presented for declaratory judgment in those cases (except of course as to the federal employee in *Mitchell* who alleged that he had been engaging in political activity said to be covered by the Act).

immunity. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The Attorney General has general authority and responsibility for administering this statute as well as for enforcing federal law generally. But there is a question—a judicial question—on the pleadings in this case as to his authority to require appellees to register. True it is that his insistence that they do so is within his authority in the sense that he is entitled to make a decision bearing upon his administration of the statute, as officials generally are entitled to do in carrying out their responsibilities; but even though such a decision becomes a first step in setting in motion the processes of government, when it gives rise to a controversy such as we have here the basis for the immunity disappears.² For in such circumstances a suit against an officer of the United States neither affects the disposition of property as in *Larson* nor, as in *Reisman*, interferes in an unwarranted manner with the functioning of government (the “public administration” of *Land v. Dollar*, 330 U.S. 731 (1947)).

Unlike the situations in either *Larson* or *Malone v. Bowdoin*, 369 U.S. 643 (1962), this suit does not require the appellant to do or not to do anything. In *Larson* an injunction was sought prohibiting the Administrator of the War Assets Administration from selling certain property to anyone but plaintiff, who claimed to have a valid contract to buy it from the Administrator. The Court referred to “no allegation of any statutory limitation” on the Administrator’s powers as a sales agent. In *Malone* the action sought to eject a Government officer from land which he occupied under claim of title from the United States. Referring to *Larson* the Court pointed out that there “the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator’s powers.” In our case appellees rely upon a congressionally built-in exemption which is a limitation upon the statutory authority of appellant.

² The existence of a justiciable controversy does not fall away because the decision has not been pursued further during the pendency of this litigation.

[fol. 38] The suit is designed to ascertain what the statute contemplates. If appellees are held to come within the exemption the law is vindicated. If they are found not to come within the exemption appellant remains free to proceed as he deems advisable. In neither case does the suit seek to require appellants to act affirmatively, to surrender property, or even to stay his hand except as understandable self-restraint leads him to do so at present. The Government does not contend that declaratory judgments may never be entered against officers of the United States or that an express consent to be sued is always necessary. See *Greene v. McElroy*, *supra*, where there was no discussion of the immunity doctrine; *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, where the Court sustained jurisdiction and negated the possibility of immunity; and *United Public Workers v. Mitchell*, *supra*.³

The exemption provision is contained in the statute itself and must be construed howsoever the status of appellees is determined. For this purpose the Declaratory Judgment Act is peculiarly appropriate. Of course that Act is not a waiver of sovereign immunity, but it is a means of determining the issue upon the resolution of which the application of the immunity turns.

The lines of the immunity doctrine are elusive. As this court suggested in *Reisman*, policy considerations are strong determinants in cases raising the problem. The majority opinion in this case does not discuss the policy reasons which serve to justify the result reached. It seems to me desirable to encourage judicial settlement of a legal dispute free from the coercive effect of penal sanctions when the dispute arises out of a regulatory statute like the one before us.⁴ As indicated above the dis-

³ The Supreme Court has said: "Courts of Justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government . . ." *United States v. Lee*, 106 U.S. 196, 220 (1882).

⁴ A leading authority has indicated that courts have been too uncritical and unanalytical in their application of the doctrine,

pute presents a justiciable issue. Accordingly there was no abuse of discretion in retention of jurisdiction by the District Court to decide whether to give a declaratory judgment. I would therefore affirm.

[fol. 40]

[File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Civil 3729-61
No. 17,105

ROBERT F. KENNEDY, Attorney General of the
United States, Appellant,

v.

VICTOR RABINOWITZ and
LEONARD B. BOUDIN, Appellees.

Appeal from the United States District Court
for the District of Columbia

Before: Wilbur K. Miller, Fahy and Wright, Circuit
Judges.

JUDGMENT—April 4, 1963

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

with its exceptions created in *Ex parte Young*, 209 U.S. 123 (1908). See 3 *Davis, Administrative Law*, pp. 545-576 (1958).

In his dissenting opinion in *Larson*, Mr. Justice Frankfurter took occasion to say: "Sovereign Immunity" carries an august sound. But very recently we recognized that the doctrine is in 'disfavor'. [Citing *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940)]. It ought not to be extended . . ." 337 U.S. at 723.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reserved, and that this cause be, and it is hereby, remanded to the District Court with directions to dismiss the case on the pleadings as an unconsented suit against the United States.

Per Circuit Judge Wright.

Dated: April 4, 1963.

Separate dissenting opinion by Circuit Judge Fahy.

[fol. 41] Petition for rehearing covering 12 pages filed April 18, 1963 omitted from this print. It was denied, and nothing more by order. May 1, 1963.

[fol. 48] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 17;105—September Term, 1962

ROBERT F. KENNEDY, Attorney General of the
United States, Appellant,

y.

VICTOR RABINOWITZ and
LEONARD B. BOUDIN, Appellees.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Fahy, Washington, Danaher, Bastian, Burger, Wright, and McGowan, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—May 1, 1963

On consideration of appellees' petition for rehearing en banc, it is

Ordered by the court en banc that the petition is hereby denied.

Per Curiam.

[fol. 51] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 52]

SUPREME COURT OF THE UNITED STATES

No. 287—October Term, 1963

VICTOR RABINOWITZ, et al., Petitioners,

vs.

ROBERT F. KENNEDY, Attorney General of the United States.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

